IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

Petitioner,

vs.

THE RATH PACKING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

DEAN C. DUNLAVEY,
GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
47th Floor,
Los Angeles, Calif. 90071,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF FOR RESPONDENTS.

Opinions Below.

The Opinion of the Court of Appeals for the Ninth Circuit in the case involving respondent The Rath Packing Company ("Rath") is reported at 530 F.2d 1295 (Pet. App. 1-34);* the Opinion in the case

*References herein are abbreviated as follows:
a - single joint appendix
Jones Br. - brief of petitioner Jones
Pet. - Jones' petition for certiorari
App. - appendix
Br. Opp. - Rath's brief in opposition to petition for certiorari
J#1. R.T. - reporter's transcript, *Rath v. Jones*
J#1. C.T. - clerk's transcript, *Rath v. Jones*

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involving respondents General Mills, Inc., *et al.* (the "millers") is reported at 530 F.2d 1317 (Pet. App. 35-52).

The Opinion of the District Court for the Central District of California in the *Rath* case is reported at 357 F.Supp. 529 (Pet. App. 57-68); the Opinion in the millers' case is unreported *per se* but appears as an appendix to the appellate opinion at 530 F.2d 1359 (Pet. App. 53-55).

Jurisdiction.

The jurisdictional requisites are adequately set forth in Jones' brief.

Constitution, Statutes and Regulations Involved.

The pertinent constitutional provisions, statutes and regulations are:

Federal.

Constitution of the United States, Article VI, Clause 2 (supremacy clause);

Constitution of the United States, Article I, Section 8, Clause 3 (interstate commerce clause);

Constitution of the United States, 14th Amendment (due process clause);

Wholesome Meat Act of 1967, 81 Stat. 584, 21 U.S.C. section 601 *et seq.* ("Meat Act");

J#2. R.T. - reporter's transcript, *Gen. Mills, et al. v. Jones*
J#2. C.T. - clerk's transcript, *Gen. Mills, et al. v. Jones*
R.T. - reporter's transcript, *Rath v. Becker*
C.T. - clerk's transcript, *Rath v. Becker*
Calif. 39 States AC Br. - amici curiae brief of 39 states, prepared by California
Calif. 33 States AC Br. - amici curiae brief of 33 states, prepared by California in support of Jones' petition
N.Y. AC Br. - New York amicus curiae brief

Federal Food, Drug, and Cosmetic Act, 52 Stat. 1047, 21 U.S.C. section 301 *et seq.* ("FDCA");

Federal Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. section 1451 *et seq.* ("FPLA");

9 Code of Federal Regulations section 317.2(h)(2)(Pet. App. 93);

21 Code of Federal Regulations section 1.8b(q) (Pet. App. 92).

California.

Business and Professions Code, section 12211 ("§ 12211"—Pet. App. 69);

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 ("Article 5"—Pet. App. 70).

Questions Presented.

Only a single question is presented by petitioner Jones, viz.:*

> "Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures [viz., § 12211 and

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*Rules 23 subd. 1(c) and 40 subd. 1(d), S.C.R., provide that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court" and that "the brief [on the merits] may not raise additional questions or change the substance of the questions already presented. . . ." Accordingly, this certiorari is properly concerned only with the single question raised by Jones as to whether federal laws preempt one California statute (§ 12211) and one California regulation (Article 5).

This certiorari does not include any question as to the well reasoned holdings below that the federal regulations are valid (530 F.2d 1308-1312, 1323-1324; see Br. Opp. 14-18), a question raised only by California in its own unsuccessful petition

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> Article 5] are preempted by Federal laws [viz., by the Meat Act as to Rath's bacon, by the FDCA and/or the FPLA as to the millers' flour] pursuant to Article 6, Clause 2 of the Constitution of the United States."

This generalized preemption question comprises the following particular questions:

1. Whether the Court of Appeals was correct in holding that the Meat Act preempts and precludes California from imposing *state* net weight labeling requirements which "in addition to, or different than" *federal* net weight labeling requirements made under the Meat Act.

2. Whether the Court of Appeals was correct in holding that the FPLA preempts and precludes California from imposing *state* net weight labeling requirements which "are less stringent than or require information different from" *federal* net weight labeling requirements made under the FPLA.

3. Whether the Court of Appeals was correct in holding that the FDCA preempts and precludes California from imposing *state* net weight labeling requirements which "impermissibly conflict" with *federal* net weight labeling requirements made under the FDCA.

for certiorari (No. 75-1052) and smuggled into its amici curiae brief (Calif. 39 States AC Br. 48) and into the New York amicus curiae brief (N.Y. AC Br. 5); nor as to the holdings below, following *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932), that the federal regulations form part of the federal labeling standards (530 F.2d 1314, 1324); nor as to Handbook 67, which has nothing to do with enforcement provisions of any California statute or regulation, which never has been an issue in these cases, and which is not even mentioned in the decisions below.

4. Whether the Court of Appeals was correct in holding that the specific California net weight labeling requirements in issue, viz., § 12211 and Article 5:

> (a) are "in addition to, or different than" the federal net weight labeling requirements made under the Meat Act;
>
> (b) "are less stringent than or require information different from" the federal net weight labeling requirements made under the FPLA; and
>
> (c) "impermissibly conflict" with the federal net weight labeling requirements made under the FDCA.

Statement of the Case.

Respondents cannot accept the factual statements of Jones and of those amici supporting him as to the two cases under review by this certiorari, said facts being sprinkled throughout their briefs and most being without a vestige of evidentiary support in the record—the statements are not fair to the Court of Appeals, to the District Court, to the issues or to the record, and do not provide this Court with an adequate picture of the cases.

These two cases concern net weight labeling statutes and regulations (federal and California) as they pertain to two prepackaged foods, respondent Rath's meat (bacon herein) and respondent millers' flour. These two foods have two characteristics in common which make them different from the vast bulk of the "hundreds of thousands of different products" inspected by Jones (Calif. 39 States AC Br. 34)—viz., each food contains

water moisture when packaged and each food is packed in a non-hermetically sealed package (viz., not air tight). Because of these characteristics, this moisture content can and generally will change (and hence the net weight will change) after the time of packaging and shipping and before the time of sale to the consumer. These cases center upon the irreconcilable conflict between federal laws and Jones' enforcement of certain California laws in dealing with this fact of nature.

Contrary to the incessant harangue of Jones and his California amicus about "evils of short weighting", "cheat and defraud", "unfair competition", "fraud on purchasers", "truth in packaging", "protecting consumers", etc., these are not "consumer protection" cases at all. These simply are test cases where certain California officials are trying to impose a "minimum-weight" concept,* contrary to the federal concept requiring accurate weight subject to reasonable variations from specified causes.

Rath's Bacon.

Respondent Rath is a corporation organized and existing under the laws of the State of Iowa, having its principal place of business in the State of Iowa, and is a meat processor engaged in interstate commerce and therefore subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967

*"Minimum-weight" concept meaning that the net contents must weigh not less than labeled net weight at the time of sale; overweight, viz., under-declaration of net contents, is permitted under this concept.

(the "Meat Act") [47a, 54a, 59a, 67a-69a]. Rath has been granted inspection by the United States Department of Agriculture ("USDA") [47a-48a, 54a, 69a]. USDA inspectors inspect the Rath establishment continuously to enforce the Meat Act and its regulations [60a, 81a, 83a] and they have access to all parts of the establishment at all times [83a, 85a].

Among Rath's meat food products is bacon, which is packaged in containers that are sold by retail stores [69a]. The facts of this case as to Rath are limited to bacon but are equally applicable to other meat and meat food products subject to the Meat Act [70a].

Part of the USDA inspection includes inspection as to the accuracy of labeled net weight of bacon, both when it leaves Rath's establishment [21 U.S.C. §607(b); 84a] and also at the retail level [21 U.S.C. §§ 672, 673; 84a].

The Meat Act sets forth various labeling requirements at 21 U.S.C. § 601(n), one such requirement (§ 601(n)(5)) providing that:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . . (5) if in a package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . .: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to this statute and its proviso, Title 9 Code Federal Regulations § 317.2(h)(2) provides that:

> "Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."*

Hence, the federal *statute* sets forth the basic net weight labeling requirement that each package of bacon shall bear an accurate statement of net contents, while the *regulation* authorized by the statutory proviso relaxes this literal and impossible statutory standard by recognizing reasonable variations from exact accuracy which are caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.**

Both of these recognized causes for reasonable variation are beyond the reasonable control of the packer. First, even under the best of good manufacturing practices, most packages will have some minor but unavoidable deviation from exact accurate weight when manufactured. It would be economically impossible to manufacture each package of sliced bacon with an exact weight of one pound, no more, no less—the time and cost would be prohibitive.

Therefore, in accordance with net weight compliance procedures which always had full USDA approval [R.T. 52], Rath bacon in issue was packed within a pass zone of 10/16 ounce—centered upon a target or average weight as a midpoint [86a-87a, 89a]. Prior to the onslaught of Jones' inspections, Rath's target weight for one pound bacon was + 3/16 ounce over stated net weight [87a, 89a].*

Second, because of its moisture content, bacon in a non-hermetically sealed package (viz., not air tight) will lose moisture after being packaged—before it leaves Rath's establishment as well as during the course of good distribution practices after it leaves the establishment [105a]. One pound of bacon will lose approximately 1/16 ounce of moisture by evaporation between the time it is packaged and weighed and the time it leaves Rath's establishment [90a-91a, 94a]. The average net weight of all bacon leaving Rath's establishment thus was greater than labeled net weight [R.T. 106]**—viz., it was the weight of the aforesaid average overpack less the 1/16 ounce moisture loss between the time of packaging and time of leaving the establishment [93a].

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*Petitioner Jones in this certiorari never has challenged validity of this regulation. Counsel for Jones told the district court, "Well, we don't challenge the validity of (h)(2) . . . Frankly, I hadn't considered whether it is valid or not. . . ." [J#1. R.T. 49]. And Jones' petition and brief herein present no question as to the Court of Appeals' holding that the regulation is valid and forms part of the definition of misbranding.

"The regulation having been made . . . in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute." *Atchison, T. & S.F. R. Co. v. Scarlett,* 300 U.S. 471, 474 (1937). See, *United States v. Mersky,* 361 U.S. 431, 438 (1960).

**Similar regulations are found not only under the FDCA and FPLA as to foods, drugs and cosmetics (21 C.F.R. § 1.8b(q)), but also under the FPLA as to other consumer commodities as adopted by the Federal Trade Commission (16 C.F.R. § 500.22).

*Because of the off sale activities of petitioner, the target weight or overpack was changed by Rath to + 5/16 ounce on October 27, 1971, to + 7/16 ounce on January 12, 1972, and to + 12/16 ounce on March 2, 1972 [87a-88a]; at a cost to Rath exceeding $10,000 [60a, 89a].

**This is in marked contrast to Jones' argument that the federal system "is to allow *shortages* in 'reasonable' amounts for *every package* . . . ." (Jones Br. 8).

Hence, the label of each package of bacon leaving Rath's establishment showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and by moisture loss in the establishment [60a-61a]. The uncontroverted evidence was that the USDA sub-area supervisor for Southern California knew of no bacon leaving the Rath establishment during the time period in issue that was not in compliance with the net weight labeling requirements of the Meat Act and its regulations, and USDA records showed none [81a-82a]. There was no evidence that Rath had violated federal net weight standards in any way (530 F.2d 1299).

After leaving Rath's establishment, the same one pound package of bacon will continue to lose about .3 to .4 sixteenths of an ounce of moisture per day by evaporation during the course of good distribution practice [94a-95a]. Also, the wrapper of the same bacon (using a wax saturated insert board) will absorb about 5/16 ounce of moisture and grease from the bacon during such distribution [94a]. There was no evidence that any bacon in issue had been subjected to other than good distribution practice.

It is uncontroverted that the label of each package of bacon in issue always showed an accurate statement of net weight, subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during good distribution practice—and thus always was in full compliance with the Meat Act.

The Millers' Flour.

Respondent General Mills, Inc. is a corporation organized and existing under the laws of the State of

Delaware, having its principal place of business in the State of Minnesota. Respondent The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Respondent Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts [1a, 7a, 41a].

Each respondent miller manufactures, packages, labels, distributes, and introduces or delivers for introduction into commerce, wheat flours for family consumption conforming to definitions and standards of identity as set forth in 21 C.F.R. Part 15, Subpart A, promulgated pursuant to 21 U.S.C. §§ 341, 371—which allows up to 15 percent moisture by weight. Such family flours are "foods" under the Federal Food, Drug, and Cosmetic Act ("FDCA") and are "consumer commodities" under the federal Fair Packaging and Labeling Act ("FPLA") [2a, 7a, 10a, 16a, 28a-30a, 42a].

The net weight labeling of respondent millers' flours is regulated by the FDCA and the FPLA. The FDCA (21 U.S.C. §§ 331, 343) prohibits "The introduction or delivery for introduction into interstate commerce of any food . . . that is adulterated or misbranded", and provides that:

> "A food shall be deemed to be misbranded . . . (e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight . . .: *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted . . . by regulations prescribed by the Secretary."

The FPLA similarly provides for an accurate statement of quantity on the label (15 U.S.C. §§ 1452, 1453, 1454, 1460).

Pursuant to this FDCA statutory proviso (and also under the FPLA), Title 21 Code Federal Regulations § 1.8b(q) provides that:

> "Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."*

Hence, analogously to the Meat Act and bacon, the federal *statutes* (FDCA and FPLA) set forth the basic net weight labeling requirement that each package of flour shall bear an accurate statement of net contents, while the *regulation* (promulgated under both the FDCA and FPLA) relaxes this literal and impossible statutory standard by recognizing reasonable variations from exact accuracy which are caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.

It was conceded that each package of flour in issue, when introduced or delivered for introduction into commerce by any respondent miller, bore a label containing an accurate statement of the quantity of the contents in terms of net weight [530 F.2d 1320; 35a-37a;

*Jones' petition and brief present no question as to the Court of Appeals' holding that the regulation is valid and forms part of the definition of misbranding. His brief to the Court of Appeals stated that he "take[s] no position on this issue" (p. 12, fn. 5).

J#2. R.T. 31-32]. At that time, the flour was comprised of about 13-14 percent moisture by weight [29a].

Flour is hygroscopic and gains or loses moisture (and hence weight) dependent on the relative humidity of the surrounding atmosphere. At relative humidities of 60% and under, it loses moisture; at higher humidities, it gains moisture. Under normal, good distribution practice, flour often is subjected to relative humidities below 60% and a loss of moisture frequently occurs [32a-34a].

Because of this hygroscopic nature of wheat flours, variations of several percent from the labeled quantity of net weight can be caused by loss or gain of moisture during the course of good distribution practice after such wheat flours are introduced or delivered for introduction into commerce [32a]. Such gain or loss of moisture has no effect on the nutritional value of the flour [35a]. By the natural course of things, this variation is more likely to occur with an increase in distribution time and resultant additional exposure to varying atmospheric temperature and humidity, as is often the case during interstate commerce.

The millers' flour has been in compliance with FDCA and FPLA net weight labeling laws at all times. Any variation from accuracy of the label statement of net weight, as supposedly found by Jones, is conceded to have been due to moisture loss during the course of good distribution practice [36a-37a; J#2. C.T. 160-161, 201-202].

California's Off Sale Enforcement.

The injunctions ordered by the Court of Appeals pertain only to two California statutes and three regulations thereunder [44a, 63a] and this certiorari is

even more limited, so as to include only one of these statutes (§ 12211) and only one of these regulations (Article 5) (Jones Br. 2).*

It should be emphasized that there never was any evidence or issue in this case as to the laws or practices of any state other than California—and no evidence or consideration of Handbook 67. Attempts by amici supporting Jones to expand this case into a vehicle for reviewing Handbook 67, or the problems of weights and measures enforcement by 39 other states as to "hundreds of thousands of products", are outside the record and grossly improper.

In the latter part of 1971 and the early part of 1972, Jones' inspectors (and other counterpart county inspectors all acting under the California Director of Food and Agriculture—68a) enforcing California § 12211 and Article 5** conducted concentrated inspections of bacon at retail [50a, 55a, 57a, 70a, 100a, 102a], checking not for quality or adulteration but only for the accuracy of the statement of net weight on the label [R.T. 209]. At about the same time, Jones' inspectors also were enforcing the same laws as to packages of family flour in the possession of wholesalers and retailers [4a, 8a, 18a-26a, 43a].

Section 12211 does not follow the federal statutory concept of requiring an accurate statement of net weight at the time of shipment (subject to reasonable variation caused by unavoidable deviations in good manufacturing practice) followed by recognition of moisture loss during the course of good distribution practice, but rather requires "that the *average* weight . . . of the packages . . . in a lot of any such commodity sampled shall not be *less, at the time of sale or offer for sale,* than the net weight . . . stated upon the package. . . ." Article 5, adopted to implement and enforce § 12211 and followed by Jones, provides for weighing a few samples taken from a lot (*i.e.,* 15 samples out of a lot of 300), calculating the average weight of the samples, and then "estimating" the lot average weight from the sample average weight [12a, 70a, 100a, 106a]. Article 5 allows no recognition of any variation as to any individual package in the course of calculating the average weight of the samples; once the sample average weight is calculated, Article 5 allows some "variation" for statistical purposes in "estimating" the lot average weight but the variation is solely to assure an acceptable mathematical probability of the accuracy of the estimation [108a]. If the estimated lot average is "less" than labeled net weight, then the whole lot is ordered off sale. Article 5 tells nothing as to which packages in a lot are the underweight packages—thus, overweight and accurate weight packages are ordered off sale along with everything else. The system of § 12211 and Article 5 is admittedly simple—but the problem is that it is grossly different from the concept of the Meat Act, the FDCA and the FPLA.

Section 12211 and Article 5 make no distinction between products that lose moisture and those that do not (530 F.2d 1300-1301; 108a); neither § 12211 nor Article 5 allows any recognition of net weight

*The Opinions of the Court of Appeals discuss two statutes (§§ 12211, 12607) and three regulations (Articles 5 and 5.1 of subchapter 2, and subchapter 2.1), but the petition (and hence this brief) is confined to § 12211 and Article 5.

**Jones Br. 6-7, 40-41. Jones ignored other and conflicting California net weight labeling requirements set forth elsewhere in California's Business and Professions Code and Health and Safety Code; see section IIIc *infra.*

variations caused either by unavoidable deviations in good manufacturing practice or by gain or loss of moisture during good distribution practice.

According to Jones, his California enforcement standard was "accuracy on the average of the lot at the time and place of sale" (Jones Br. 4, 7). However, as recognized in Jones brief (p. 4) and California's AC brief of 39 states (pp. 10, 37, 40, 43, 63), off sale orders are not issued if the lot average is overweight.* Thus, Jones' standard really is *minimum* weight on the average of the lot at the time and place of sale. If the inspector estimated that the average net weight of the lot was "short weight" even by as little as 2/10ths of 1/16th of an ounce (less than 1/10 of 1%), all packages in the lot [including exact weight and overweight packages—J#2. C.T. 73, 75] were ordered off sale — with no consideration as to the cause of the short weight [97a-98a, 100a-101a] and with no recognition whatsoever of any reasonable variation as required by the federal regulations (530 F.2d 1300-1301).

As to Rath's bacon, no consideration was given to whether the packages had left the plant in compliance with the Meat Act [101a],** nor to the kind of distribution practice that the bacon had been subjected to after leaving Rath's plant [100a-101a], nor to whether the short weight was the result of loss of moisture during the course of good distribution practice [101a-

*California's AC Brief of 39 States, at p. 43, argues "nor does it make sense to be compelled to order off-sale overweight packages".

**As Jones' counsel admitted, "When [the inspector] takes packages off the shelf at Von's market in Riverside he does not know what that package weighed at the plant. He has no idea. He couldn't care less." [J#1. R.T. 55].

102a, 103a, 105a, 106a, 108a]—and yet loss of moisture by evaporation during the course of distribution was a primary reason why these inspectors (using the Article 5 weighing procedure) found short weight in Rath's bacon at retail [61a-62a, 98a-99a]. In short, the bacon was ordered off sale by Jones at a time when it was in full compliance with the net weight labeling requirements of the Meat Act. According to the Meat Act (21 C.F.R. §§ 317.1(c), 317.12) net weight labeling or relabeling must be done under federal inspection, hence packages of bacon ordered off sale could not be relabeled as to net weight by the wholesaler or retailer and so were returned to Rath, thereby effectively making it a total loss (in excess of $10,000) to Rath [92a, 90a].*

Similarly, as to the millers' flour, if the inspector estimated that the average net weight of the lot was below the labeled net weight, all packages (including exact weight and over-weight packages) were ordered off sale with no consideration as to the cause of the estimated short weight [18a-26a]—*i.e.*, no consideration was given to the fact that the packages had left the millers' mills with a net weight equal to labeled net weight, nor to the fact that the estimated short weight simply was the result of loss of moisture during the course of good distribution practice. The requirements being imposed by Jones permitted no variation from labeled net weight caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice. Again, in short, Jones' inspectors were ordering

*Jones' argument (Jones Br. 4) that a lot marked off sale could be rectified by finding and removing short weight packages is unsupported in the record and is false.

"off sale" packages of family flour possessed and owned by wholesalers and retailers which were in full compliance with the applicable net weight labeling requirements of the FDCA and the FPLA. The flour wholesaler or retailer likewise is precluded by law from altering the labeled net weight (*i.e.*, from 5 pounds to 4 pounds, 15½ ounces) since family flour is required by California Business and Professions Code Section 13000 to be labeled in specified full pound sizes. Accordingly, the wholesaler or retailer returned the packages of flour to a respondent miller, who thereby absorbed losses exceeding $10,000 [39a-41a].

The net weight variations underlying the off sale orders were trivial. In the case of bacon, it was an average of less than 4/16 ounce in a one pound package—or less than 2% [96a-97a]. In the case of flour, the average variation was in the range .125 percent to 1.78 percent by weight [36a; J#2. C.T. 160-161, 201-202]. And the variations were of nothing but water!

Further, at least in the case of Rath's bacon, the California weighing procedure for net weight determination is different from the USDA weighing procedure and, whether the two procedures are applied to the same bacon simultaneously or at different times, the differences between the two procedures can lead to a different conclusion as to whether the bacon is accurately labeled [96a, 98a, 107a-108a]. For example, the USDA procedure for net weight determination is to subtract from gross package weight the weight of a dry wrapper ("dry tare") [83a, 95a]. In contrast, the California procedure for net weight determination is to subtract from gross package weight not only the weight of the dry wrapper but also the

weight of any of the product (*i.e.*, moisture and grease) absorbed into or retained on the wrapper ("wet tare") [95a, 102a-103a]. The California procedure of subtracting the wet tare leads to a net weight determination for a pound of bacon of approximately 5/16 ounce less than the USDA procedure using the dry tare [95a-96a]. The average "short weight" for which Rath's bacon was ordered off sale [4/16 ounce—97a] thus was less than the 5/16 ounce net weight difference resulting from the difference in weighing procedures alone.*

Another feature of § 12211 and Article 5 which should not be overlooked is that the law does not provide for a hearing or review at any time whereby the respondents or a wholesaler or retailer can challenge the accuracy of a particular net weight inspection or the propriety of a particular off sale order. The inspectors admittedly make mistakes in their weighings and/or calculations and thus issue off sale orders erroneously (104a)—but there is absolutely no redress when this happens.

Summary of Argument.

The foods in issue, meat and flour, contain moisture and are packaged in non-hermetically sealed packages. Accordingly, they will lose moisture (and hence weight) between the time they are shipped by the manufacturer

*Such different conclusions between federal and Article 5 weighing procedures also can result from the fact that the California inspector is sampling at retail a different lot than the USDA inspector was inspecting at the establishment. Example: suppose the USDA inspected and passed 1000 packages, 700 of which were overweight and 300 of which were underweight, all because of unavoidable deviations in good manufacturing practice; and also suppose that the latter 300 were all shipped to one store and inspected there as a lot by Jones; Jones would order them off sale, thereby negating the federal system.

and the time they are purchased in the retail store by the consumer. Manifestly, since the actual net weight of a package of either of these foods thus is continuously changing weight, the labeled net weight can be made accurate (viz. equal to actual net weight) at only one point in time. The basic irreconcilable conflict (albeit not the only one) between the federal laws on one hand, and California's § 12211 and Article 5 on the other hand, is that they designate different times when this accuracy is required to occur.

The Meat Act (regulating meat) and the FDCA and the FPLA (both regulating flour) uniformly provide that the labeled net weight shall be accurate at the *time of shipment* (subject only to reasonable variations caused by unavoidable deviations in good manufacturing practice); each then further provides for recognition of reasonable variation thereafter caused by loss or gain of moisture during the course of good distribution practice.

In stark contrast, section 12211 and Article 5 provide that the labeled net weight shall be accurate (more precisely, equal to or less than the actual net weight) at the *time of sale to the consumer*—and recognize no variation caused by unavoidable deviations in good manufacturing practice or by loss or gain of moisture in the course of good distribution practice. This necessarily means that the labeled net weight must be inaccurate at the time of shipment—specifically, the labeled net weight at time of shipment must be an underdeclaration of actual net weight (that is, there must be an intentional overpack to some indeterminate extent)—which, in turn, means that the system of section 12211 and Article 5 is different from, and hopelessly conflicts with, the system of the federal acts.

This difference and conflict can be resolved only by finding preemption of net weight labeling by the federal acts, and by enjoining application of § 12211 and Article 5 to the foods in issue. Moreover, the Meat Act contains an express preemption against state "labeling . . . requirements in addition to, or different than" the federal requirements; and the FPLA contains an express preemption against state laws that "provide for the labeling of the net quantity of contents . . . which are less stringent than or require information different from" the federal requirements—section 12211 and Article 5 obviously contravene each of these express preemption clauses.

A national uniform standard for net weight labeling has been legislated by Congress; section 12211 and Article 5, when they are applied to the foods in issue, frustrate and defeat the Congressional objective; the decisions below correctly enforce the Congressional objective by holding section 12211 and Article 5 unenforceable as to the foods in issue. The decisions are correct and should be affirmed.

ARGUMENT.

I
PREEMPTION.

The Rath and flour cases were covered in a single petition by Jones under Rule 23 subd. 5, S.C.R., as involving "closely related questions" of federal preemption under the supremacy clause of the United States Constitution, but each involves different federal laws and thus requires separate and distinct consideration.

a. The Wholesome Meat Act of 1967 Preempts and Precludes California From Imposing State Net Weight Labeling Requirements Which Are "In Addition To, Or Different Than" the Meat Act's Net Weight Labeling Requirements.

Under the Constitution of the United States, Article VI, Clause 2, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land. . . ."

One kind of federal preemption of an area of Law, and hence the states' exclusion from that area, is when "the Congress has unmistakably so ordained" (*Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, rehear. den. 374 U.S. 858 (1963)).

The Meat Act is an instance of such express preemption as to the imposition of additional or different *labeling requirements* on meats and meat food products which are in or substantially affect interstate commerce,* in that it provides:

> "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those

*The exclusive regulation of an industry by a federal agency, when part of the industry's sales are intrastate and part are interstate, is well established (*Mulford v. Smith,* 307 U.S. 38, 47 (1938); *Campbell v. Hussey,* 368 U.S. 297, 298-299 (1961). ". . . in areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude *any* state regulation, even if harmonious." (*DeCanas v. Bica,* ..... U.S. ....., 47 L.Ed.2d 43, 51 fn. 7 (1976)).

> made under this chapter may not be imposed by any State. . . ." (21 U.S.C § 678).

The validity of this express "clear and complete" preemtive provision of 21 U.S.C. § 678 heretofore has been upheld by the Sixth Circuit in *Armour and Company v. Ball,* 468 F.2d 76, 85 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973).

In fact, Jones has repeatedly and unequivocally conceded that the foregoing provision of § 678 constitutes preemption of the imposition of labeling requirements [J#1. C.T. 83, 89; J#1. R.T. 26, 29-31]:

> "The foregoing statutory language makes it clear, and Jones concedes, that the federal government has preempted the field of regulating the marking, labeling, packaging, or ingredient requirements of packaged meat food products." [J#1. C.T. 89].*

Thus, there is no question that California *cannot* impose labeling requirements on Rath's bacon which are "in addition to, or different than" the labeling requirements of the Meat Act. Therefore, the only

*"Mr. Keir: Yes. Section 678 puts marking, labeling, packaging or ingredient requirements all into one bag. And it says in substance there, and we concede, that the Federal Government has preempted these functions." [J#1. R.T. 31].

"[Mr. Keir] We have freely conceded, your Honor, that the Federal Government has pre-empted the field as to labeling." [J#1. R.T. 26].

"The Court: So certainly that area, that misbranding area, if you want to call it misbranding, that misbranding area has been preempted."

"Mr. Keir: Right." [J#1. R.T. 30-31].

question presented in the *Rath* case is the definition of "labeling requirements"—viz., whether "labeling requirements" include requirements as to the accuracy of the statement of net weight on the label.

"Labeling" is defined to include all written or printed matter on the package (21 U.S.C. § 601(p)). The labeling requirements of the Meat Act originate in 21 U.S.C. § 601(n), and each requirement is imposed by saying that a meat or meat food product is "misbranded" if its label does not meet the requirement. Those labeling requirements which pertain to the accuracy of statements of net weight on the label are set forth in § 601(n)(5) and 9 C.F.R. § 312(h)(2):

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . . (5) if in a package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . .: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary." (21 U.S.C § 601(n)(5)).
>
> "Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." (9 C.F.R. § 312(h)(2)).

Jones' argument that "Labeling is a matter of format ["type size, location"; "display and graphics"], not of substance behind the label" (Jones Br. 40), is untenable.* His quote (Jones Br. 32-33) from the

*The Court of Appeals charitably characterized this argument as "strained" (530 F.2d 1314, fn. 25).

Secretary of Agriculture's 1967 letter, saying that the Meat Act was intended to prevent "deceptive labeling", hardly shows labeling to be only a matter of format—prevention of deception is clearly a substantive requirement of accuracy. In fact, the first of the Meat Act's labeling requirements (21 U.S.C. § 601(n)(1)) is that "labeling" not be "false or misleading"—unequivocally establishing that labeling is a requirement of substance, not just of format. A review of the many other labeling requirements in § 601(n), which likewise are requirements of substance and not of format, confirms the absurdity of Jones' argument.* Even New York's amicus curiae brief (p. 5) recognizes that the Meat Act provides "for net weight labeling" and "require[s] 'accurate' labeling".**

The Meat Act thus imposes a net weight labeling requirement that every package bear a statement of net weight which is accurate except for a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during the course of good distribution practice. Any meat or meat food product whose label does not meet this requirement is defined to be "misbranded"—the Meat Act uses "misbranded" synonymously and interchangeably with "mislabeled", see 21 U.S.C. § 602.

*Jones' carelessness in argument also is exemplified by contrasting his assertion that "The respondents are not required by the State to have a label . . ." (Jones Br. 40) with Business and Professions Code § 12024.5 requiring ". . . any person . . . that packs any commodity . . . in any package which is intended for retail, shall mark the net weight of the commodity therein upon the package."

**Jones equally applies the same "format" argument to labeling requirements of the FPLA, notwithstanding Senate Report No. 1186 (89th Cong., 2d Sess.) stating "regulations promulgated under the act shall supersede State law only to the extent that the States impose *net quantity of contents labeling requirements* which differ . . . ." (Emphasis added).

Since the Meat Act literally defines "misbranded" as a term describing a failure to meet any of the Meat Act's numerous labeling requirements, the courts below correctly held that the express federal preemption of labeling requirements included a preemption of defining what is misbranded (530 F.2d 1314 fn. 25). The district court put it about as succinctly as possible: "Common sense tells us that mislabeling and misbranding are synonymous terms." (357 F.Supp. 529, 535 fn. 4).

As is already evident from the statement of facts, the problem with § 12211 and Article 5 is that they impose additional and different labeling requirements as to net weight. Instead of following the federal requirement that each package bear an accurate statement of net weight subject only to reasonable variation caused by unavoidable manufacturing deviations and/or by moisture loss during distribution, the § 12211/ Article 5 requirement is minimum weight on the average at the time of sale. This is a wholly different net weight labeling requirement, a wholly different definition of misbranding.

Section 678 of the Meat Act does give the states "concurrent jurisdiction" to the following extent:

> "any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution . . . of any such articles which are . . . misbranded and are outside of [the packing plant] . . . ."

but this "concurrent jurisdiction" is expressly limited to preventing distribution of an article which is "misbranded" within the definition of the Meat Act. Con-

trary to Jones' argument that the decisions below "oust State authority with respect to weights and measures of commodities" and "restrict the States from inspecting meat food packages to protect against . . . short weighting" (Jones Br. 9, 34), California is free to exercise "concurrent jurisdiction" with the Secretary to prevent distribution of a "misbranded" article—*but* California must start out by adopting the same definition of "misbranded" as does the Secretary.* California cannot impose a net weight labeling requirement which is "in addition to, or different than" the net weight labeling requirements of the Meat Act by effectively imposing a definition of "misbranded" which is "in addition to, or different than" the definition of the Meat Act—yet, this is exactly what California's § 12211 and California's Article 5 do** and that is why the courts below have enjoined their application (530 F.2d 1314).

Because of the failure of § 12211 and Article 5 to recognize any variation caused by unavoidable deviations in good manufacturing practices and/or by gain or loss of moisture during the course of good distribution practices, and because of the "minimum-weight on the average at time of sale" requirements of § 12211, Jones is ordering Rath's bacon off sale for violating the net weight labeling requirements of § 12211 and Article 5 although the bacon is in full compliance with net weight labeling requirements of the Meat Act—an indicia of federal-state conflict and the Meat

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*_Armour and Company v. Ball_, 468 F.2d 76, 84 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973).

**Jones uses the definition of misbranded, and a range of tolerances based only on statistical sampling considerations, set forth in Article 5 [J#2. C.T. 22; Pet. 6; Jones Br. 40-41].

Act's preemption.* The only way Rath could meet Jones' requirement of minimum weight on the average at time of sale would be by inaccurately labeling net weight at the time of shipment so as to deliberately under-declare actual net weight (viz., by overpacking), which would be a variation from accurate labeling for a non-recognized cause and thus a violation of the Meat Act. This is another indicia of federal-state conflict and the Meat Act's preemption.**

b. The FPLA Preempts and Precludes California From Imposing State Net Weight Labeling Requirements That "Are Less Stringent Than or Require Information Different From" the FPLA's Net Weight Labeling Requirements.

The FPLA is another instance of express preemption as to net weight labeling requirements in that it provides:

> "It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States . . . insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." (15 U.S.C. § 1461).*

*". . . we think to permit such regulation as is embodied in this statute is to permit a state . . . to destroy rights arising out of the Federal statute which have accrued . . . to . . . the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." (*McDermott v. Wisconsin,* 228 U.S. 115, 133-134 (1913).)

**"A holding of federal exclusion of a state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. . . . ." (*Florida Avocado Growers v. Paul,* 373 U.S. 132, 142-143 (1963). See *Northern States Power Co. v. State of Minn.,* 447 F.2d 1143, 1146 (8th Cir. 1971), aff'd. 405 U.S. 1035 (1972).

Citing the FPLA, Jones again concedes the "controlling jurisdiction of the federal government with regard to labeling" (Jones Pet. 13 fn. 5). Section 1461 expressly points out that the subject matter which is preempted is the "labeling of the net quantity of contents", thereby negating California's argument that the preemption is only as to labeling "format" ("type, size or color") (Calif. 39 States AC Br. 31-32).

Significantly, Jones' petition did not list the FPLA as a federal statute to be involved in any certiorari—and Jones' brief makes no mention of the FPLA other than to state that this proceeding arises under it (p. 4). Jones literally has taken no issue with the Court of Appeals' holding of preemption of § 12211 and Article 5 by the FPLA, or with its reference to S. Rep. No. 1186, 89th Cong., 2d Sess., May 25, 1966, that section 1461 was intended to provide expressly for the superseding of state "net quantity of contents labeling requirements which differ from requirements imposed under the terms of the [FPLA]" (530 F. 2d 1325). Hence, the parties hereto agree that California *cannot* impose net quantity labeling requirements on the millers' flour which are "less stringent than" or which "require information different from" (*viz.*, "differ from") the net quantity labeling requirements of the FPLA. Respondents contend that the *amici curiae* should not be permitted to inject a question

*This is a preemption of "net contents" regulations (*Atlantic Ocean Products, Inc. v. Leth,* 292 F.Supp. 615 (D. Ore. 1968), aff'd. 393 U.S. 127 (1968).

of the FPLA preemption into this certiorari when Jones has failed to do so.

As section 1461 provides, the net weight labeling requirements of the FPLA are to be found in "section 1453 . . . or regulations . . ." These net weight labeling requirements of the FPLA are as follows:

> "(a) No person . . . shall distribute or cause to be distributed in commerce any packaged consumer commodity unless in conformity with regulations . . . which shall provide that—
>
> (1) The commodity shall bear a label . . .;
>
> (2) The net quantity of contents (in terms of weight, . . .) shall be separately and accurately stated . . . upon the principal display panel of that label." (15 U.S.C. § 1453).

The net weight labeling regulation which provides these § 1453 requirements is 21 C.F.R. § 1.8b(q):

> "(q) The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deivations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." (21 C.F.R. § 1.8b(q)).

The reasonable variation provisions of this regulation clearly are a proper exercise of the authority granted the Secretary of Health, Education and Welfare under § 1454 to exempt a consumer commodity from full compliance with the exact accuracy requirement of § 1453 because the nature of the commodity, or some

other good and sufficient reason, makes such compliance impracticable or not necessary for adequate consumer protection. In fact, these variations were assured during hearings before the House's Committee on Interstate and Foreign Commerce [J#2. C.T. 257].*

The FPLA labeling requirement as to net quantity of contents thus is that the label of every package shall bear a statement of net weight which is accurate except for a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practice. This labeling requirement is preemptive of any California net weight labeling requirement that is either less stringent or different. The "information" required by the FPLA as to the net contents of a sack of flour is its accurate weight, subject to the prescribed reasonable variations, when introduced into commerce, *i.e.*, 5 lbs.; whereas the information required to comply with California's § 12211 and Article 5 for the same sack would be 4 lbs. 13.6 oz., assuming exposure to low relative humidity caused a 3% weight loss during good distribution practice.

California's § 12211 and Article 5 impose net quantity labeling requirements that (1) are less stringent than the FPLA, because they permit overweight and also recognize a statistical variation that the FPLA does not, and (2) require information different from the FPLA, because they require minimum weight on the average at time of sale instead of accurate weight

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*Moreover, § 1460 provides that nothing contained in the FPLA shall be construed to supersede the FDCA—a clear rebuttal of California's argument that the FPLA does not allow adoption of "reasonable variation" regulations to products covered by both acts (Calif.-39 States AC Br. 27, fn. 24).

at time of shipment with recognition of specified variations—which is the standard under the FPLA and its regulation.

By requiring minimum weight on the average at time of sale, § 12211 and Article 5 inherently require under-declaration of net weight (overpacking) at the time of shipment—but the amount of the overpacking would vary from packer to packer in accordance with their varying guess-timates of prospective moisture loss. The consumer thus would be hamstrung in trying to compare price with weight among different brands at retail, because the actual net weights would differ from labeled net weights by varying amounts from brand to brand. Section 12211 and Article 5 thus frustrate the Congressional objective under the FPLA of "facilitat[ing] value comparisons" (15 U.S.C. § 1451). In contrast, the federal system implements the § 1451 goal of "accurate [label] information as to the quantity of contents" by requiring each package to be accurately labeled at the time of shipment (subject only to reasonable variation from unavoidable deviations in good manufacturing practice)—subsequent moisture loss during distribution will be consistent from brand to brand and the consumer can make a meaningful value comparison at retail.

Since § 12211 and Article 5 impose net quantity labeling requirements that are both less stringent than, and require information different from the FPLA, the courts below properly have enjoined their application. Jones is ordering flour off sale as violating the net weight labeling requirements of § 12211 and Article 5 when it is in full compliance with the net weight labeling requirements of the FPLA—and the only way to meet Jones' requirements is to overpack instead of showing an accurate statement of net weight as

required by the FPLA. Such federal-state conflict would require a holding of preemption even without the FPLA's express preemption.

c. The FDCA Preempts and Precludes California From Imposing State Labeling Requirements That "Impermissibly Conflict" With the FDCA Labeling Requirements.

The question of whether the FDCA preempts § 12211 and Article 5 as to net weight labeling can be determined by ascertaining whether these California laws interfere with, or frustrate, or conflict with, the operation of the net weight labeling requirements of the FDCA.*

If there is such interference, frustration or conflict, then there is preemption of this limited area of net

*"Of course, even absent such a manifestation of congressional intent to 'occupy the field,' the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws. . . ." (*DeCanas v. Bica,* ..... U.S. ....., 47 L.Ed.2d 43, 50 fn. 5 (1976)).

Preemption "depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz,* 312 U.S. 52, 67. . . ." (*Florida Avocado Growers v. Paul,* 373 U.S. 132, 141 (1963)).

"But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application." (*Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 156 (1942)).

". . . to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution." (*McDermott v. Wisconsin,* 228 U.S. 115, 132 (1913)).

"If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress. . . ." (*Savage v. Jones,* 225 U.S. 501, 533 (1911)).

weight labeling—notwithstanding that food laws and net weight labeling laws may be traditionally within the police power of the state.*

The labeling requirements of the FDCA which pertain to net weight are set forth in 21 U.S.C. § 343 and 21 C.F.R. § 1.8b(q):**

> "A food shall be deemed to be misbranded— . . .
>
> (e) If in package form unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight . . .: *Provided,* That under clause (2) of this subsection reasonable variations shall be permitted . . . by regulations prescribed by the Secretary." (21 U.S.C. § 343).
>
> "The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice

*". . . it is equally well settled that the state may not, under the guise of exercising its police power or otherwise, . . . enact legislation in conflict with the statutes of Congress passed for the regulation of the subject. . . ." (*McDermott v. Wisconsin,* 228 U.S. 115, 131-132 (1913)).

"Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways . . . the state policy may produce a result inconsistent with the objective of the federal statute." (*Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

**The labeling provisions of federal food and drug laws are not matters of format, but matters of accuracy—*i.e.,* to assure that the weight of contents is "correctly stated", that the goods are "truly labeled". (*McDermott v. Wisconsin,* 228 U.S. 115, 130, 133 (1913)).

> will be recognized. Variations from stated quantity of contents shall not be unreasonably large."* (21 C.F.R. § 1.8b(q)).

Again, because § 12211 and Article 5 fail to recognize any variation caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practices, Jones is ordering the millers' flour off sale for violating these California net weight labeling requirements even though the flour is in full compliance with the net weight labeling requirements of the FDCA —and the only way to meet Jones' requirement of minimum-weight at retail would be for the millers to ship their flour with net weight intentionally underdeclared (viz., overpacked) by the amount of maximum possible moisture loss during good distribution practices, which would be a clear conflict with the FDCA requirement for an accurate statement of net weight. Jones' off sale orders are conflicting with, and frustrating, the intent of Congress.

II

CALIFORNIA'S § 12211 AND ARTICLE 5 ARE DIFFERENT FROM, AND CONFLICT WITH, FEDERAL NET WEIGHT LABELING REQUIREMENTS.

Both the Court of Appeals and the District Court found as a fact that the net weight labeling requirements of § 12211 and Article 5 are different from federal net weight labeling requirements (530 F.2d 1300-1301). "Defendants here do not, in any sense of the

*The "question presented" by petitioner does not dispute the holding in the decision below that this regulation, having been duly promulgated, is an integral part of the FDCA net weight labeling requirement (530 F.2d 1324).

word, pretend to be applying federal statutory standards." (357 F.Supp. 535).

Jones asserts that the net weight labeling requirement of § 12211 and Article 5 is of "accuracy on the average of the lot at the time and place of sale" (Jones Br. 7); however, since § 12211 prohibits only average net weight that is *less* than the labeled net weight and since Jones takes no action against overweight lots (Calif. 39 States Br. 10, 40, 43, 63), the true § 12211/Article 5 net weight labeling requirement is minimum weight on the average throughout distribution and extending to the time of sale to the consumer.

The federal statutory requirements (sans regulations) are accurate weight—not minimum weight on the lot average. Hence, the requirement of § 12211 and Article 5 is different from and in conflict with the federal requirements if only the federal statutes are considered (9a).

Both the Court of Appeals and the District Court found that the net weight labeling requirements of § 12211 and Article 5 contair no provision for recognition of reasonable variation caused either by unavoidable deviations in good manufacturing practice or by gain or loss of moisture during the course of good distribution practice (530 F.2d 1300-1301, 1314); the federal regulations require such recognition. Hence, the requirements of § 12211 and Article 5 are different from and in conflict with the federal requirements when the federal regulations are considered along with the federal statutes.

The labeling requirements of Article 5 do recognize variations to compensate for sampling error inherent

in the statistical and averaging approach used by Article 5; such variations are not recognized by any of the federal statutes or regulations.

Finally, both the Court of Appeals and the District Court found that "the California inspectors employed a different weighing method" than the federal weighing method (530 F.2d 1299), this difference alone accounting for more supposed short weight as to bacon than the average short weight alleged to exist by Jones.

In summary, the federal concept is that each package of the foods in issue shall be accurately labeled as to net weight when shipped (except for unavoidable deviations in good manufacturing practice), and that thereafter loss of moisture during good distribution practice shall be recognized. In contrast, the § 12211/Article 5 concept is that the foods in issue shall be overpacked when packaged,* to an extent that any "lot" thereof found in a retail store shall then have an average net weight not less than labeled net weight—with no recognition of variation from manufacturing deviations or moisture loss. The relative merits of the two concepts may be arguable, but the differences and the conflict are not.

These differences contravene the express preemption provisions of both the Meat Act and the FPLA, as well as conflict with, and frustrate the intent of Congress under these federal acts. These differences also give

*But not even Jones knows by how much, since no one knows how long it will be before the package is sold [C.T. 184-185]. Moreover, as discussed more fully in the Amicus Curiae brief filed below on behalf of the United States by the Department of Justice, this alternative of indefinite and voluntarily selected overpacks has the disadvantage for the consumer that he no longer can accurately compare price with weight, from brand to brand, because the overpacks will not be uniform among brands (Br. Opp. App. 18-21).

rise to an impermissible conflict with the FDCA. As the amicus curiae brief of New York correctly recognizes, "This conflict frames the issues before the Court." (N.Y. AC Br. 4). The outcome of the conflict is determined by the Supremacy Clause—the federal requirements must prevail.*

The federal laws preempt and preclude California from imposing different and/or conflicting labeling requirements. Section 12211 and Article 5 are different and conflicting—hence, the courts have enforced the federal laws by enjoining imposition of § 12211 and Article 5. It is as simple as that. If California wants to enact and enforce requirements that are not different and conflicting, it is free to do so (530 F.2d 1314).**

*The actual enforcement procedure of California's § 12211 and Article 5 also was challenged by respondents as a violation of procedural due process (Constitution of the United States, 14th Amendment. See: *In re Murchison,* 349 U.S. 133, 136 (1954); *Shields v. Utah Idaho Central R. Co.,* 305 U.S. 177, 182 (1938); *Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589, 596-597 (1930)). The "off sale" order issued by Jones' inspector at the time of inspection requires the merchant to remove such packages from his shelves immediately. Since the merchant cannot re-label the packages, they are eventually returned to the manufacturer (Rath or a miller), who has no recourse but to accept them and reimburse the merchant for his loss. Neither the manufacturer nor the merchant is given any hearing or other chance for a defense before the "off sale" order deprives the right to sell the flour; neither is given any hearing or review after the "off sale" order; and neither has any remedy at all as to an "off sale" order which has been made illegally or incorrectly. This "kangaroo court" administrative procedure, which deprives the merchant of his property right to sell respondents' products and which gives no one any chance for a hearing or redress, is a deprivation of property without due process of law as to both the merchant and respondents. The availability of a court review of the over-all off sale procedure by a writ of mandate or a declaratory relief action, such as is transpiring in this very case, provides no due process review or hearing because it will never reach the merits of any particular off sale order with which Rath and the millers have been confronted.

**Notwithstanding California's assertions that the decisions below set a standard that can "absolutely not" be enforced

III

THE DECISIONS BELOW ENFORCE THE CONGRESSIONAL INTENT OF NATIONAL AND UNIFORM NET WEIGHT LABELING REQUIREMENTS.

The petulant theme of Jones' Brief, and of California's 39 State amici curiae brief, is composed of wholly unsupported factual allegations that enforcement of the federal net weight labeling requirements is too difficult for state inspectors,* and that the federal enforcement agencies are incapable of doing their job**—and of a plea that Jones therefore should be allowed to rush in and fill the alleged vacuum.

and that "there is no way in which the States can enforce these federal regulations" (Calif. 39 States AC Br. 45, 52) and Jones' assertion that they set a standard "of complete impracticality" and "an impossible task" (Jones Br. 8), California already has adopted as of June 1, 1976 an interim emergency regulation entitled Article 5.2 that purports to comply with those decisions.

*"the task is one of complete impracticality"; "to apply the [federal] standard on a product-by-product basis . . . is administratively untenable"; "without State laws and State enforcement, there would have been no effective enforcement possible in the United States" (Jones Br. 8, 18, 25 fn. 22). "There is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of . . . packagers"; "there is no sound reason why . . . the weights and measures inspector should be forced . . . to determine whether the shortages found were 'reasonable' "; "making determinations of what is 'good manufacturing practice' [is] difficult, if not impossible" (Calif. 39 States AC Br. 45, 52).

**"There is little weights and measures inspection by federal officials . . . and even less enforcement"; "self regulation . . ., rather than governmental enforcement, prevails in the FDA system"; "the federal government has simply not been geared for adequate inspection" (Jones Br. 7, 11). "FDA simply does not have the staff to do the job"; "FDA's record of enforcement of even federal adulteration standards has been less than adequate"; "guess about what USDA might do if it had trained and equipped personnel"; "the FDA and USDA are ill-prepared to implement these shared objectives as their enforcement staffs are minimal and without either adequate training or necessary equipment" (Calif. 39 States AC Br. 46, 64, 67).

Aside from the fact that such a theme is no answer to the Supremacy Clause, the theme is false—the federal scheme is workable and works, and has served the country well with a uniform standard for many years.*

a. Recognition of Reasonable Variations Caused by Unavoidable Deviations in Good Manufacturing Practice Is Practical and Essential.

Recognition of reasonable variations caused by unavoidable deviations in good manufacturing practice is practical and essential. Even Jones concedes, "Accuracy in each package is too expensive to be compatible with good manufacturing and distribution practice." (Jones Br. 7). Handbook 67 agrees that "Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection *must* be recognized and allowances for such imperfection must be made." (Calif. 33 States AC Br. App. 5).

However, Jones complains that the federal system requires different variations for different products, "that the federal standard must vary depending upon the product involved", that it becomes "necessary to apply the standard on a product-by-product basis", and "The factors would vary also according to whether the product is hygroscopic or nonhygroscopic" (Jones Pet. 21; Jones Br. 18). Of course this is all true, and it should be that way. Bacon has a pass zone of 10/16 ounce because it is hard to achieve an exact pound with approximately 20 slices of bacon; on the other hand, flour is particulate

*The USDA made it clear in one of the state court cases that the USDA does not need, and has not sought, any help from California in taking short weight meat food products off sale at the retail level (Br. Opp. App. 1-5).

and can be measured sufficiently accurately that Jones did not dispute that each flour package in issue was accurate weight when shipped by the millers. Handbook 67 agrees that "The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made and may be predicated, to a certain extent, on knowledge. Consideration should be given to . . . (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging . . . the inspector must exercise greater liberality in the determination of the reasonableness of errors in packages containing large individual elements" (Calif. 33 States AC Br. App. 15).

California's argument that "making determinations of what is 'good manufacturing practice' [is] extremely difficult, if not impossible" (Calif. 39 States AC Br. 52) has no evidentiary support whatever in the record. The record shows only that variations from such cause are not recognized by California inspectors. And the reason is not because of any insurmountable difficulty but simply because § 12211 and Article 5 allow no such recognition.

From the days of the 1914 regulations under the Federal Food and Drug Act of 1906, as amended in 1913, the federal requirement has been to recognize this kind of variation but to require that it "shall be as often above as below the marked quality".* In short, the federal law has required accuracy-on-the-average at the time of shipping, with any individual package's variation from accuracy (over or under) to stem only from unavoidable deviations in good manufacturing practice. Thus, the manufacturer packs full weight.

*530 F.2d 1311.

California conflicts with the federal law first as to the timing, arguing with the FDA's election to gauge accuracy at the time of shipping and saying instead "that FDA's discretion . . . should be exercised to facilitate full net quantity and accurate statement of net weight [on the average *at the time of sale*] to the consumer. . . ." (Calif. 39 States AC Br. 19, 21 fn. 18; Jones Br. 7). Section 12211 and Article 5 also conflict as to the cause of any recognized variation, recognizing nothing for unavoidable deviations in good manufacturing practice but allowing variation for the statistical purpose of assuring a supposedly accurate relationship between the average weight of the samples and the average weight of the lot.

Section 12211 and Article 5 clearly are in conflict with federal law and are frustrating the Congressional intent.

b. Recognition of Reasonable Variations Caused by Gain or Loss of Moisture in the Course of Good Distribution Practice Is Practical and Essential.

Recognition of reasonable variations caused by gain or loss of moisture in the course of good distribution practice is practical and essential, and also has been part of federal law since the regulations of 1914.* As Handbook 67 says, "Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs." (Calif. 33 States AC Br. App. 7).

*530 F.2d 1311.

As Handbook 67 further points out, enforcement of this variation is well within the capability of an experienced inspector:

> "It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribution practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture." (Calif. 33 States AC Br. App. 7-8).

There is no evidentiary support for Jones' contention that there is any difficulty in recognizing variations caused by moisture loss in the course of good distribution practice. The record shows only that variations from such cause are not recognized by California inspectors. And the reason again is simply because § 12211 and Article 5 allow no such recognition.

It is obvious that a package which is accurately labeled as to net weight when shipped by the manufacturer, and which thereafter gains or loses moisture during the course of good distribution practice, will have some variation above or below net weight when

sold to the consumer. On the other hand, it is equally obvious that if the same package is to be accurately labeled at the time it is sold to the consumer, it must have some intentionai variation above or below accurate net weight when shipped by the manufacturer —although not even Jones knows which or by how much because no one knows what conditions the package will be subjected to before it is sold nor for how long [C.T. 184-185, 236-237]. These two alternatives are mutually incompatible. And whichever alternative was selected, the consumer will pay accordingly—no lawsuit is going to furnish the consumer something for nothing. As discussed more fully in the Amicus Curiae brief filed with the Court of Appeals on behalf of the United States by the Department of Justice, the federal alternative of accurate weight at time of shipment (with recognition of specified variation) has the advantage for the consumer that he can accurately compare price with weight, from brand to brand, because the packs would be uniform among brands (Br. Opp. App. 18-21).

From another standpoint, a law requiring an accurate statement of net weight would be unconstitutional as violative of substantive due process* if it did not recognize reasonable variations caused by moisture loss during the course of good distribution practice. This was the decision of the Court of Criminal Appeals of Texas in *Overt v. State*, 260 S.W. 856 (Tex. 1924), with an opinion so well reasoned and persuasive that it is set forth in Appendix 1 hereto. See also *United*

*The 14th Amendment to the Constitution of the United States provides "nor shall any State deprive any person of . . . property, without due process of law". The California Constitution has an identical provision in Article I, Section 13, Clause 6.

States v. The Merchants Biscuit Co. (D.Colo. 1924), *Decisions of Courts in Cases Under the Federal Food and Drugs Act*, p. 1129.

The time for accuracy (subject to manufacturing deviations) can be when shipped by the manufacturer or when sold to the consumer—but it cannot be both. Federal law selects the former time; § 12211 and Article 5 select the latter and allow no recognition of any variation caused by loss of moisture during the course of good distribution practice. Section 12211 and Article 5 thus clearly are in conflict with federal law and are frustrating the Congressional intent.

c. California and Many Amici Curiae States Have Their Own Statutes and Regulations Recognizing Reasonable Variations Caused by Unavoidable Deviations in Good Manufacturing Practice and/or bv Gain or Loss of Moisture During the Course of Good Distribution Practice.

Jones argues that it is impractical or impossible for his inspectors to enforce the federal standard requiring recognition of reasonable variations caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture during the course of good distribution practice. The absurdity of this argument is that, in fact, California has laws requiring Jones to do exactly this.

Jones' office as county sealer is created by Section 12200*, Article 2, Chapter 2, Division V, California Business and Professions Code—the same Article 2 contains the enforcement section 12211 in issue. Both

*"§12200. *County sealer; appointment; term; expenses; deputies; employees; inspectors.* There is in each county the office of county sealer of weights and measures. . . ."

section 12200 and section 12211 were adopted in 1939, being derived from statutes of 1913. Article 5 was adopted under the authority of § 12211, effective January 1961. Following a practice extending back many years, Jones' inspectors have conducted their net weight labeling inspections using Article 5 procedures to estimate average net weight of the lot—and issuing off sale orders under the authority of § 12211, oblivious to more recent California laws on the same subject.

In 1969, following passage of the FPLA in 1966, California adopted its own Fair Packaging and Labeling Act.* In doing so, the California legislature expressly recognized the preemption of the FDCA and FPLA as to net weight labeling requirements by providing that:

> "The sale of any commodity packaged in a container, wherein both the container and the contents thereof comply with any act of Congress or rules or regulations promulgated thereunder, appertaining to weight . . . does not violate the provisions of this chapter; . . ." (Cal. Bus. & Prof. Code § 12612)
>
> "If any provision of this chapter is less stringent or requires information different from any requirement of [FPLA] or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement, is a part of this chapter." (Cal. Bus. & Prof. Code § 12613).

*Sections 12601-12615, Chapter 6, California Business and Professions Code.

As Jones alleges,* his net weight determinations and off sale orders took place solely under § 12211 and Article 5—Jones simply ignored the "hands off" admonition of the aforesaid section 12612, and likewise ignored 12613 whereby the California legislature was telling him that the FPLA "reasonable variation" regulation had become a part of California law.

In 1970, California also adopted its present Food, Drug, and Cosmetic Law.** The California legislature recognized the preemption of the net weight labeling requirements of the FDCA and FPLA by providing that:

> "All labels of foods . . . shall conform with the requirements of the declaration of net quantity of contents of [FPLA] and the regulations adopted pursuant thereto. . . ." (Cal. Health and Safety Code § 26430).
>
> "All regulations . . . pertaining to foods . . . pursuant to the [FPLA] shall be the regulations of this state. . . . No regulations shall be adopted which are contrary to the labeling requirements for the net quantity of contents required pursuant to [FPLA] and the regulations adopted pursuant to that section." (Cal. Health and Safety Code § 26438).
>
> "Any food is misbranded if it is in package form, unless it bears a label containing all of the following information:
>
> * * *
>
> "(b) An accurate statement of the quantity of contents in terms of weight . . .

*Jones Br. 40-51; Jones Pet. 6.

**Sections 26000-26851, Division 21, California Health and Safety Code.

"Reasonable variations from the requirements of subdivision (b) shall be permitted. . . ."*
(Cal. Health and Safety Code § 26551).

Regulations under this statute provide:

"(k) Where the statement [of the quantity of the contents] does not express the minimum quantity:

(1) Variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure, after the food is introduced into intrastate commerce to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure:

(2) Variations from the stated weight, measure, or numerical count shall be permitted when caused by unavoidable deviations in weighting, measuring, or counting individual packages which occur in good packing practice. But under subdivision (2) of this paragraph, variations shall not be permitted to such extent that the average of the quantities in the packages comprising a shipment or other delivery of the food is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment or delivery compensate for such shortage.

"(1) The extent of variations from the stated quantity of the contents permissible under para-

*Directly flouting this statutory requirement is California's argument that "there is no sound reason why . . . the weights and measures inspector should be forced . . . to determine whether the shortages found were 'reasonable'." (Calif. 39 States AC Br. 45).

graphs . . . (k) of this regulation . . . shall be determined by the facts in such case." (17 Cal. Adm. Code, Chap. 5, Subchap. 2, Group 1, Art. 3, § 10805(k), (l).)

Falling within California's description of being "resistant to change and relying upon outmoded practices" (Calif. 39 States AC Br. 19), Jones ignores these more recent California laws requiring recognition of the same reasonable variations as the FDCA and FPLA.*

Also in 1970, California adopted its own Meat and Poultry Inspection Act, for meat subject only to intrastate commerce.** Following the pattern set by the Meat Act, the California legislature again recognized the same reasonable variations:

"A livestock or poultry product is misbranded unless it bears a label showing all of the following:

* * *

(b) An accurate statement of the quantity of the product in terms of weight, . . .

"The director may permit reasonable variations. . . ." (Cal. Agr. Code § 18782).

Regulations under this statute provide:

"900. *Adoption of Federal Regulations.* . . regulations of the United States Department of Agriculture governing meat and meat products

*All California laws on net weight labeling should be read together and mutually construed. "It is clear that 'all acts *in pari materia* are to be taken together, as if one law'. . . . [T]hat these two acts are *in pari materia* is plain. Both deal with precisely the same subject matter. . . ." (*United States v. Stewart*, 311 U.S. 60, 64 (1940)). See also *Gleason v. Stern*, 81 Cal. 217, 221 (1889).

**Sections 18650-18931, Part 3, Chapter 4, California Agricultural Code.

inspection . . . Title 9, Part 301 et seq. . . . are adopted by reference as regulations of the Director. . . ." (3 Cal. Admin. Code, Chap. 2, Subchap. 4, Article 1, § 900).

Most, if not all, of the other 39 amici curiae states likewise have, in their own state laws, a requirement recognizing reasonable variations from accuracy in statements of net weight labeling as to hygroscopic foods.* For example, the amicus brief of New York sets forth its own state law permitting "variations from the declared weight . . . when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight" (N.Y. AC Br. 14-15); and then has the temerity to criticize the comparable federal requirement by arguing "when an inspector discovers variations, how is he or she to determine whether they were caused by gain or loss of moisture, or by some other factor" (N.Y. AC Br. 9). Similarly, New York complains that the federal regulations do not set "forth any objective standards to measure the reasonableness of permitted variations", ignoring the fact that New York state law likewise sets forth no measure of the variations it permits (N.Y. AC Br. 8, 14-15). Amici curiae can hardly argue rationally to this Court that the federal standard is too difficult to enforce, when their own state legislatures are setting the same standard.**

*See Appendix 2 hereto.

**Contrary to another lament of the amici states, the decisions below do not void all statistical sampling systems *per se*. They void Article 5 because its statistical goal is to estimate whether the average net weight is less than labeled net weight, a goal which is not the federal test; the decisions below said nothing about invalidity of a statistical sampling system if its statistical goal was to estimate whether each package bore an accurate statement of net weight subject to reasonable variation from the two specified causes, which goal would be the federal test.

d. Handbook 67 Is Irrelevant.

Jones' assertion that "California, like the overwhelming majority, if not all, the states, uses the principles of the National Bureau of Standards *Handbook 67* for inspecting packages commodities" (Jones Br. 6) is in error and is wholly devoid of evidentiary support in the record. Jones' inspections did not use Handbook 67. There was no evidence as to the laws or practices of any state other than California and absolutely nothing to show any uniformity among state systems. There was no evidence or consideration of Handbook 67 at all.

No state other than California uses § 12211 or Article 5; § 12211 and Article 5 have nothing to do with Handbook 67; there is no evidence as to how, if at all, Handbook 67 is used by any state; Handbook 67 never was in evidence and never even was the basis of argument until the petitions for certiorari. The decisions below say nothing of Handbook 67. Whether "Handbook 67 prescribes enforcement procedures which are not in conflict with or different than the federal regulations" (N.Y. AC Br. 10) is not an issue to be decided in this certiorari.*

*Handbook 67 calls for recognition of variations caused by unavoidable deviations in good manufacturing practice and by loss or gain of moisture during the course of good distribution practice—but it does not say how much variation is to be allowed for either cause. Accordingly, whether any state's usage of Handbook 67 satisfies the federal acts will depend, *inter alia*, upon whether that state can meet its burden of proof that the respective amounts of variation allowed by that state for any given commodity are reasonable. See *United States v. Kraft Phenix Cheese Corporation*, 18 F.Supp. 60, 62 (S.D. N.Y. 1936).

Handbook 67, issued in 1959, claims to be nothing more than a "guide" for weights and measures officials (Calif. 33 States AC Br. App. 3). It does not purport to be "a federal standard . . . by the Secretary of Commerce" (Jones Br. 9)—moreover, the authority to regulate labeling under the federal acts in issue is given to the USDA and to the Department of Health, Education, and not to the Department of Commerce.

Handbook 67 is materially different from Article 5. First, Handbook 67 provides for recognition of net weight variations caused by moisture loss occurring during the course of good distribution practices (Br. Opp. App. 27-28) and notes that "The Model Regulation provides that 'variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure * * * to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.' The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the states."* In fact, the author of Handbook 67 testified before the district court in *General Mills, Inc., et al. v. Furness*** that proper application of Handbook 67 recognizes variations from moisture loss as *additional* to the variations allowed by the tabulation in the Handbook (Br. Opp. App. 31-36). In contrast, California does not recognize variations caused by moisture loss. California admits that its laws are not designed to "determine the *cause* of a discrepancy from label weight" (Calif. 33 States AC Br. 15).

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*See, *i.e.*, Model State Packaging and Labeling Regulation 1975 (Br. Op. App. 37-38).

**398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 536 (2d Cir. 1975).

Handbook 67 recognizes that "the experience and judgment of the inspector must be relied upon" in "the building up of a working knowledge as to . . . what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (Br. Opp. App. 27-28). California, to the contrary, concedes that it is "impossible" for an inspector enforcing Article 5 to determine the cause of a net weight variation or to determine whether it is reasonable (Calif. 33 States AC Br. 16).

Second, Jones concedes that "Under Handbook 67 individual package variations are allowed, both over and under the stated quantity, to make the packaging process compatible with good commercial packaging and distribution practices" (Jones Br. 23), and Handbook 67 recognizes that even "greater liberality" must be exercised in determining the reasonableness of variations caused by good manufacturing practice in "packages containing large individual elements", such as slices of bacon (Br. Opp. App. 29-30). In contrast, California gives no recognition at all to net weight variations caused by unavoidable deviations in good manufacturing practice. Jones says "there is no way a weights and measures inspector can know the manufacturing capabilities and procedures or practices of the hundreds of thousands of domestic packagers. . . ." (Jones Br. 45). However, the USDA and FDA inspectors manage to do this and Handbook 67 admonishes that this kind of inspection should be done by "trained specialists who concentrate on this type of work" (Calif. 33 States AC Br. App. 6).

Considering the differences between Handbook 67 and Article 5 on the very points in issue, it is inexcusable

for petitoner to represent that "The methods employed under Article 5 and Handbook 67 preserve the single national standard of accuracy. . . ." (Jones Pet. 8-12, 21-23).

e. General Mills, Inc., et al. v. Furness Is Not in Conflict With the Decisions Below.

There is no conflict between the decision below and any matter (Handbook 67 or otherwise) that was involved in the Second Circuit affirmance (without any opinion) of *General Mills, Inc., et al. v. Furness,* 398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 836 (2d Cir. 1975) (Jones Pet. App. 95-109). First, *Furness* has no relevancy to the Rath case since it did not deal with the Wholesome Meat Act of 1967 and never considered the express preemption clause of 21 U.S.C. § 678. As Jones says, "Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act" (Jones Pet. 19).

Second, the district court in *Furness* observed that "Both the city ordinance and federal regulation permit reasonable variations caused by loss of moisture during the course of good distribution practice." (Jones Pet. App. 97, 105-106); and held that the federal action was premature because the city ordinance imposed no penalty except as adjudged by a state court action—an action wherein the manufacturer could attempt to show that its product was entitled to even more variation (in amount) than had been allowed by the inspector (who was using Handbook 67 solely as a guide)—and such state court action had not yet even been filed (Jones Pet. App. 108). Section 12211 and Article 5, in marked contrast, recognize absolutely no such variation whatsoever.

Third, the pleadings in *Furness* show that every package had been separately weighed, which California says its inspectors cannot take the time to do (Jones Br. 7; Calif. 39 States AC Br. 36, App. 2 n. 1)—there was no sampling or averaging in *Furness.*

The point that Jones refuses to understand is that the preemption is as to imposition of state net weight labeling requirements that are *different* from federal net weight labeling requirements. The court in *Furness* felt that the state enforcement had not proceeded far enough to show whether there was a difference between New York City and federal requirements; the difference between California and federal requirements is uncontroverted.

Conclusion.

The federal system, as to both bacon and flour, requires that each package label bear an accurate statement of net weight, subject to reasonable variations caused by unavoidable deviations in good manufacturing practice and/or by gain or loss of moisture in the course of good distribution practice. Jones, enforcing § 12211 and Article 5, does not recognize any variation for either cause and imposes a "minimum weight on the lot average" system.

If Jones is allowed to enforce California net weight labeling requirements which are different from federal requirements, then any other state likewise may enforce its own requirements which are different from either California or federal requirements. The end result would be a myriad of different requirements and a balkanization which would preclude either Rath or the millers from manufacturing food for more than one state at

a time. This would be an undue interference with interstate commerce.*

On the other hand, if every manufacturer's bacon or flour is subjected to the same federal net weight label requirements when it leaves the establishment (which is the last time the manufacturer can control it—91a-92a), then every customer will get the same amount of nutritional substance when the package is purchased—the only weight difference will be due to non-nutritional moisture loss. This will "facilitate value comparisons", one of the objects of the FPLA.**

Congress has recognized the problems inherent in accurate net weight labeling of moisture-bearing foods, and has legislated and preempted accordingly. So long as all manufacturers are held to the same standard, neither any respondent nor any other manufacturer has an advantage over competitors—and the consumer is fully protected. And the single uniform federal standard promotes interstate commerce—which underlies each of the foods in issue.

All that the decisions below have done, of which petitioner complains, is to establish preemption and to void § 12211 and Article 5. For each of the reasons set forth herein, it is respectfully submitted that the decisions of the Court of Appeals are correct and should be affirmed.

Respectfully submitted,

DEAN C. DUNLAVEY,
GIBSON, DUNN & CRUTCHER,
Attorneys for Respondents.

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*Constitution of the United States, Article I, Section 8, Clause 3.

**15 U.S.C. 1451.

APPENDIX 1.

"The facts in this case show that the correct weight of the sack of flour was plainly marked on the sack when put up by the miller on January 2, 1924. The amount of moisture content was then 13½ per cent, same being within the federal limitation. . . . Said sack was kept 23 days in a dry warehouse and sold. Its moisture content by ordinary evaporation had diminished 1 per cent. Its weight was 7 ounces less when sold. Its food value, however, was unchanged. It is manifest that each day of the 23 during which the sack was in the warehouse, there was a change, however slight, in the weight of said sack of flour. Within limits peculiar to flour such weight would increase or diminish each day as the surrounding atmosphere be wet or dry. This announcement involves no legal principle, and is but the statement of a fact established by science and known to all men. What we have said of flour would seem to apply to all articles of food and foodstuffs put up and sold in packages not air tight; and to attempt to penalize him who sells, offers for sale, or exposes for sale a package of such stuff, because it has not plainly marked on the container the exact weight of the package, would be to place before any dealer in such stuffs his choice of being punished often and continually, or else going out of business. There appear in this law no tolerances, no variations, ... It appears inevitable that the dealer in such articles would perforce have to weigh each package in his store every day

and put thereon a new brand after each weighing, setting out the weight as of that day, according to whether the contents of such package had been increased or diminished in weight by the absorption or evaporation of moisture.

"It seems to us that we need carry the argument no further. The statement of the facts carries with it its own irresistible conclusion against the soundness of this law. The condition referred to would be intolerable. The sale in this country of such stuffs in packages is imperative. The restrictions and conditions attempted to be imposed by this law are harsh and oppressive to such an extent as to render it practically incapable of enforcement and violative of the Fourteenth Amendment to the federal Constitution. . . ."

Overt v. State, 260 S.W. 856, 858.

APPENDIX 2.

In light of the anomalous fact that California and New York (who authored the two amici briefs supporting Jones) are criticizing the federal "reasonable variation" regulations while their own state laws contain the very same provisions, counsel for respondents has endeavored to ascertain how many of the other amici states might be in the same boat. Subject to some possible error occasioned by the difficulty of obtaining the current laws of all these states, it appears that *each* of the amici states has such laws on its own books! The citations are as follows:

Alabama, Title 2, Chapter 36, §612;

Alaska, Title 17, Chapter 20 §17.20.040—7AAC 15.580 (G)(i)(ii);

Arizona, Title 36, Chapter 8, §36-906 (4)(b)—Title 41, Chapter 15, §41-2065 A. 18;

Arkansas, Title 82, Chapter 11, §82-1111 (e)(2)—Title 79, Chapter 2, §79-220 (2)(a);

Colorado, Title 25, Article 5, §25-5-411 (f)(II)—Department of Health General Regs. for Food and Commodities §1.8 b(q);

Delaware, Title 6, Chapter 51, § 5118(2)(a)—Title 6, Chapter 51, §5118 (2)(a);

Florida, Title XXXI, Chapter 500, §500.11 (5)(b)—Rules and Regs. of Florida, Chapter 5F-1, 5F-1.19 (1)(2);

Georgia, Title 42, Chapter 42.3, §42-311 (e)(2)—Rules of Georgia Department of Agriculture Weights and Measures 40-15-3-.12 (1)(2);

Hawaii, Title 19, Chapter 328, §328.10 (5) b—Hawaii Wts. and Meas. Rule 20.000/ 486-71, §§20.111.1.1, 20.111.1.2;

Idaho, Title 37, Chapter 1, §37-123 (e)(2);

Illinois, Chapter 56½, §411 (e)(2)—Chapter 147, §124(a);

Kansas, Chapter 65, §65-665 (e)(2)—KAR Agency 28, 28-21-6 (k)(1)(2);

Kentucky, Chapter 363, Volume 13, Title XXIX, §363.720(2)—302 KAR 75:120, §1 (1)(2);

Louisiana, Title 40, Chapter 4, §608(5)(b)—Title 55, Chapter 1, §55:11 (c);

Maine, Title 22, §2157 (5)(b);

Maryland, Art. 97, §19 (2)(a)—Art. 97, §19 (2)(a);

Massachusetts, Title XV, Chapter 94, §187;

Michigan, Title 12, Chapter 91, §12.933 (17) (e)(2)—MAC Supp. 75, R. 285.551.83, Rule 83 (1)(2);

Minnesota, Volume 4, Chapter 31, §31.123 sub. 5 (3)—Minn. Reg., Chapter 125, AGR 4012 (i)(1)(3);

Mississippi, Title 75, Chapter 21, Art. 1, §75-27-41 (2)(a)—Title 75, Chapter 21, Art. 1, §75-27-41 (2)(a);

Missouri, Chapter 196, §196.075 (5)(b);

Montana, Title 27, Chapter 7, §27-711—MAC, Title 16, 16-2.14 (2)-S14210;

Nebraska, Chapter 89, Art. 1, §89-187 (16);

Nevada, Title 51, Chapter 585, §585.350 (6) (b)—Title 51, Chapter 581, §581.360;

New Hampshire, Title X, Chapter 146, §146:5 v. (2)—Title X, Chapter 359, §359-A:21;

New Jersey, Title 51, §51.1-29—NJAC §§13:47 D-4.32, 13:47, D-4.33;

New Mexico, Chapter 54, Art. 1, §54-1-11;

North Carolina, Div. XVI, Chapter 106, §106-130 (5) b—Chapter 81A, Art. 2, §81A-15(9);

North Dakota, Title 19, Chapter 19-02, §19-02.1-10 (5)(b)—N.D. Food and Drug Laws and Regs. Reg. 4 (1)(3);

Ohio, Title 13, §1327.50 (0)—Title 13, §1327.50 (0);

Oklahoma, Title 2, Art. 5, §5-43—Title 2, Art. 5, §5-43;

Oregon, Title 49, Chapter 616, §616.250 (5) (b)(A)—OAR, Agr. §27-160(a)(b);

Pennsylvania, Title 76, Chapter 2, §100-22 (b) (i)—Title 76, Chapter 2, §100-22 (b)(i);

South Carolina, Title 32, Art. 4.1, §32-1526.10 —S.C. Packaging and Labeling Reg. No. 4, §§4.12.1.1, 4.12.1.2;

South Dakota, Title 39, Chapter 39-4, §39-4-1;

Tennessee, Title 71, Chapter 2, §71-222 (1) (a);

Texas, Title 14, Chapter 5, Art. 1035 (c)(1) (b)—Title 14, Chapter 5, Art. 1035 (h);

Utah, Title 4, Chapter 26, §4-26-11 (6)(2);

Virginia, Title 3.1, Chapter 20, Article 3, §3.1-944 (2)(a)—Rules and Regs., Va. Department of Agr. and Comm. §§12.1.1., 12.1.2;

Washington, Title 69, Chapter 69.04, §69.04.260—Title 16, Chapter 16-666, WAC 16-666-130 (1)(a)(b);

W. Virginia, Chapter 47, Art. 1, §47-1-24—WVAR Chapter 21-2, Ser. 1, 8.1.1.8.2;

Wyoming, Title 35, Chapter 5, Art. 3, §35-256.